UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

FLEX TEC
EMPLOYER

and **CASE 10-RD-1355**

WANDA CANADY, AN INDIVIDUAL
PETITIONER

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 1996
UNION

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned.

Upon the entire record in this case, the undersigned finds:[1]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. During the hearing the Union moved to dismiss the petition or in the alternative to stay the proceedings. That motion is hereby denied.

2. The Employer is a Georgia corporation with an office and facility located in

[1] The Union and the Employer filed briefs which were duly considered.

Byronville, Georgia where it is engaged in manufacture and assembly for the lighting industry. During the past twelve (12) months, a representative period, the Employer has sold and shipped finished goods valued in excess of $50,000.00 directly to customers located outside the state of Georgia. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved was certified as the collective bargaining representative of the bargaining unit employees of the Employer on July 2, 1999.[2] The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. As a preliminary matter, the Union, at hearing, asserted that the Petitioner is a supervisor within the meaning of Section 2(11) of the Act. A petition filed by a statutory supervisor does not raise a question concerning representation. Clyde J. Merris, 77 NLRB 1375 (1948). Thus, whether the Petitioner is a supervisor must be decided in the first instance. The record evidence established that the Petitioner makes springs in the rail area of the Employer's production operation. This is clearly a job encompassed within the certified unit and, indeed, is the very same job the Petitioner held at the time of the last election when she testified she was eligible to vote. Notwithstanding the Union's assertion that Petitioner is a supervisor, there is no evidence in the record that she possesses or exercises any of the enumerated authorities required to confer such status. Based thereon, I conclude that the Petitioner is not a supervisor within the meaning of the Act. A question affecting commerce therefore exists concerning the representation of

[2] The certified bargaining unit is: All full-time and regular part-time production and maintenance employees employed by the Employer, at its Byronville, Georgia facility; but excluding office clerical employees, guards and supervisors as defined in the Act.

certain employees of the Employer within the meaning of Section 9 (c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks an election in a unit coextensive with the unit certified by the undersigned. The general rule is that the bargaining unit in which the decertification election is held must be coextensive with the certified or recognized unit. Campbell Soup Co., 111 NLRB 234 (1955).[3] The Union asserts, contrary to the Employer and the Petitioner, that one individual previously included in the unit is a supervisor, that certain employees who were laid off in November 1999 are eligible to vote and that probationary employees should be excluded from the unit.

A. Supervisory Status

The Union asserts that Willie "Tony" Lucas is a supervisor within the meaning of the Act. As to Lucas' status as a supervisor, the Union bears the burden to establish that Lucas' exercises any of the authorities enumerated in the Act. Bennett Industries, 313 NLRB 1363 (1994).

Willie "Tony" Lucas is the sole employee regularly assigned to work in the warehouse area. Lucas, an hourly paid employee, is assigned to work on the machine used to crimp metal for the louvers that cover fluorescent lights. The record testimony establishes that Lucas possesses none of the specific authorities enumerated by the Act that would establish supervisory authority.

[3] During the hearing, the Parties stipulated that the maintenance employees should be excluded from the bargaining unit because at the current time there are no employees currently employed to perform maintenance duties. I reject the stipulation to exclude the maintenance employees from the appropriate unit. Record evidence demonstrates that at the time of the hearing maintenance functions were being performed by individuals that the parties agree are supervisors within the meaning of the Act. Were I to adopt the stipulation of the parties, and should the unit employees vote to continue representation by the Union, then in the event that any employees are hired to perform maintenance duties, those employees would, by definition, be excluded from the unit.

The Union presented evidence that unit employees have witnessed Lucas away from his work area at unauthorized times, that Lucas has been seen clocking other employees out, has been seen leaving early and arriving late, has been seen carrying a cellular phone and taking unauthorized breaks. According to the testimony, unit employees, but not supervisors, are prohibited from engaging in such activities.

As Lucas does not possess any of the supervisory authority specified in the Act and none of the evidence presented suggests that Lucas has the authority to effectively recommend any action which would directly affect other employees working conditions, evidence regarding his alleged privileges (e.g. taking extended breaks) is unpersuasive. Based upon the record evidence, I find that Lucas is a unit employee and is eligible to vote.[4]

B. Probationary Employees

The Employer's Vice President of Operations testified that all newly hired employees are placed in probationary status for their first 60 days of employment. A supervisor briefly trains (less than one day) each new employee on their assigned function and the employee is then expected to immediately perform the same function as do non-probationary employees. The uncontraverted testimony of the Vice President of Operations establishes that probationary employees work in the same area and work next to unit employees. Probationary employees have the same pay, work hours, supervision and working conditions as do other unit employees. Probationary employees are subject to the same disciplinary procedure as unit employees. Based on the record, there is no

[4] The Union subpoenaed Willie "Tony" Lucas to testify at the hearing. Lucas did not appear at the hearing nor did he request that the subpoena be revoked. The Union orally stated that the Region should seek enforcement of the subpoena, but has not formally requested subpoena enforcement, nor did they make an offer of proof as to the content of Lucas's testimony. I find that enforcement of the subpoena is unnecessary. The record contained evidence sufficient to make a determination as to Lucas's status, including substantial testimony regarding Lucas' duties and authority.

difference between probationary employees and regular employees except for the appellation.

Probationary employees are generally included in the bargaining unit if they receive and hold their employment with a contemplation of permanent tenure, subject only to the satisfactory completion of an initial trial period. Johnson Auto Spring Service, 221 NLRB 809 (1975); National Torch Tip Co., 107 NLRB 1271 (1954). Where, as in the present case, the probationary employees' general conditions of work and their employment interest are identical to the other unit employees, probationary employees are included in the unit. Rust Engineering Co., 195 NLRB 815 (1972). Based on the foregoing, I conclude that probationary employees are encompassed within the existing unit and are eligible to vote.

C. Laid-off Employees

Approximately in the autumn of 1999, prior to the September 5, 2000, hearing in this matter, the Employer began producing a new product line, "halo" units, under contract with Cooper Lighting Company, herein Cooper. Cooper contracted with the Employer to produce the product on a temporary basis during a transitional period while Cooper moved its production facilities to Mexico. In order to produce the lights for Cooper, the Employer hired approximately twenty employees solely for halo unit production.

The Employer originally was to produce forty-two thousand units. However, after only one and one-half months, Cooper cancelled the contract, indicating that it had completed its transition and could produce the product itself. Based on the permanent

discontinuation of the product line, the Employer laid off all twenty employees in or around November 1999.

Employee Alicia Harris, who had served as the lead person in the halo department, testified that the Vice President of Operations Terry Griggs called a meeting of the halo employees and informed them that Cooper was canceling the halo contract and was moving the work to Mexico, that he was "sorry about the lay-off" and that the Employer "would probably be calling some of them back." Griggs, however, testified that he did not anticipate any recall of the employees as the product line had been permanently moved from the plant.

The unequivocal and uncontradicted record evidence establishes that none of the halo employees have been recalled. In fact, the Employer laid-off eight (8) more employees in another department in March 2000, with the acquiesence of the Union. Furthermore, the uncontested testimony establishes that the Employer has no history of recalling laid-off employees. As evidence of the Employer's history of not recalling laid-off employees, testimony established that during the negotiations over the March 2000 lay-off, the Union and the Employer did not discuss or negotiate over employee recall rights.

Laid-off employees are eligible to vote only if objective evidence establishes that there exists a reasonable expectancy of employment in the near future. Sierra Lingerie Company, 191 NLRB 844 (1971). The Board considers several factors in evaluating expectancy of recall, including "the employer's past experience, the employer's future plans, the circumstances of the layoff, and what employee[s] [were] told about the

likelihood of recall." Monroe Auto Equipment Division of Tenneco Automotive, 273 NLRB 103 (1984); Atlas Metal Spinning co., 266 NLRB 180 (1983).

In the instant case, the employees in dispute were laid-off over nine months ago as a result of the Employer's permanent loss of the halo product line. The Employer's testimony that it has no history of recalling employees from layoff was unchallenged. Indeed, the Employer has hired new employees since March 2000, without recalling any laid-off employee.

Based on the foregoing, despite the statements attributed to Vice President Griggs at the time of the lay-off, I can not conclude that the objective evidence supports a reasonable expectation of recall. The product line was lost and there is no indication that the Employer expects this product line to return to the facility. Therefore, the laid-off employees do not have a reasonable expectation of recall in the near future and are not eligible to vote.

CONCLUSION

In light of the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by the Employer, at its Byronville, Georgia facility; but excluding office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION[5]

[5] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by October 6, 2000.

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.[6] Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[7]

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[6] Your attention is directed to Section 103.20 of the Board's Rules and Regulations, Section 103.20, which provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

[7] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 384 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the full names and addresses of all voters who meet the eligibility requirements set forth herein, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office 1000 Harris Tower, 233 Peachtree Street, N.W., Atlanta, Georgia 30303, on or before September 29, 2000. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Union, Local 1996.

DATED this 22nd day of September 2000, at Atlanta, Georgia.

Martin M. Arlook
Regional Director
National Labor Relations Board
233 Peachtree Street, NW
1000 Harris Tower
Atlanta, Georgia 30303

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